IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 21082

DAVID MACHADO,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF

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JURISDICTION

This is an appeal from a judgment rendered by the United States District Court for the Southern District of California, Central Division.

The appellant was sentenced to the custody of the Attorney General for a period of three years after conviction on one count on an indictment for violation of 50 U.S.C.

App. 462: Universal Military Training and Service Act: Refusal to be Inducted [CT 6].[1] Title 18, Section 3231, United States Code, conferred jurisdiction in the District Court over the prosecution of this case. Thus the Court of Appeals for the Ninth Circuit has jurisdiction of this appeal under Rule 37(A) (1) and (2) of the Federal Rules of Criminal Procedure. The Notice of Appeal was filed in the time and manner required by law [CT 7].

STATEMENT OF THE CASE

The indictment charged appellant with a violation of the Universal Military Training and Service Act for refusing to submit to induction.

Appellant pleaded not guilty and was tried by the Honorable Irving Hill, District Judge, sitting alone without a jury. Appellant was found guilty [CT 5] and sentenced to imprisonment for a period of three years [CT 6].

An oral Motion for Judgment of Acquittal [RT 39,[2] lines 1 to 14] was made during the trial.

THE FACTS

Appellant registered with his local board on October 14, 1958, as required by the Act. [Ex. 3].[3] At that time he did not claim exemption as a conscientious objector. He received a pre-induction physical examination on May 3, 1963 [Exs. 125, 126], and again on May 11, 1964 [Exs. 123, 124].

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1. CT refers to Clerk's Transcript.
2. RT refers to Reporter's Transcript.
3. Ex. refers to the plaintiff's exhibit, the complete Selective Service System file of the appellant.

On November 29, 1963, appellant sent his local board a letter which stated: "Please send me the necessary forms for a change in classification. My convictions against killing my fellow man prevents me from bearing arms." [Ex. 43]. Appellant submitted a completed Special Form for Conscientious Objectors to his local board on December 16, 1963 [Exs. 45 to 48].

On that form, appellant did not check either "yes" or "no" following Question 1 of Series II, "Do you believe in a Supreme Being?" He wrote instead the words, "I do not know." Below this, he wrote, "I believe in a Supreme order which is responsible for all being. This order does not allow me to take human life." [Ex. 45]. Appellant's father is a minister of the Church of God [Ex. 47] and his mother belongs to the same denomination. Appellant explained, "I was trained in the basis for my beliefs from my earliest childhood by my parents and associates. Further, my experiences abroad have reinforced them." [Ex. 46].

Appellant was retained in Class 1-A and appealed. His file was forwarded by the appeal board to the United States Attorney for the purpose of securing an advisory recommendation from the Department of Justice [Ex. 50]. The United States Attorney advised the appeal board, "Investigation reveals that registrant is not a conscientious objector but an agnostic, not believing in God as a Supreme Being." [Ex. 51]. The appeal board thereupon classified appellant 1-A [Ex. 52].

Appellant then asked for an appearance before his local board [Ex. 54] and was granted an "interview" on

June 11, 1964 [Exs. 58 and 59]. At this interview, appellant stated that he believed it was wrong to kill, that "He believed in a Supreme Order and it was sinful to kill." The board replied that "a conscientious objector's classification was based on belief in a Supreme Being and that they noted from his file that he did not know whether he believed in a Supreme Being." The board told registrant that he had no further right of appeal and decided not to reopen his classification [Exs. 59 and 60].

Appellant retained an attorney, Mr. Daniel G. Marshall, who wrote to Selective Service pointing out that during his appeal, appellant had not been granted the Special Appellate Procedures required by the Act, specifically, a hearing before a Department of Justice Hearing Officer [Ex. 61]. At the same time, appellant submitted a two page letter outlining his beliefs to the local board [Exs. 62 and 63], dated July 29, 1964, and marked "received" by the local board on August 3, 1964. He also requested a reopening of his classification [Ex. 64].

The Appeal Board reopened [Exs. 65, 66, 67, 68 and 71]. This time, appellant was given a hearing before a Hearing Officer whose report is found in the Exhibit at pages 72 through 85. A statement of fact and law, in reply to the Hearing Officer's recommendations, was filed by the appellant's then attorney, Daniel G. Marshall, and is found in the Exhibit at pages 89 through 96.

On October 8, 1965, appellant filed a student's certificate with his local board [Ex. 99]. On October 28, 1965, the Appeal Board again voted to classify appellant 1-A [Ex. 100].

Appellant was ordered to report for induction on December 21, 1965 [Ex. 104]. He reported as ordered but refused to submit to induction [Ex. 112].

On the induction date, appellant was given no physical examination [Exs. 116, 121, 122 and see argument below]. Also, he was not given an opportunity to review and re-execute Form DD98, the Security Questionnaire [Exs. 138 to 141].

QUESTIONS PRESENTED AND HOW RAISED

I

Was there a basis in fact for rejecting the classification claims of appellant? This question was raised by the denial of the motion for judgment of acquittal.

II

Was appellant denied due process by the manner in which the Hearing Officer's hearing was conducted? This question was raised by the records on file in this case.

III

Was the appellant denied due process of law by the Induction Station's failure to give him a physical examination on the date of induction or within one year prior to induction as required by 32 Code of Federal Regulations, Section 1628.10 and Army Regulation AR 601-270? This question was raised by the records on file in this case.

IV.

Was the appellant denied due process of law by the Induction Station's failure to give appellant an opportunity to fill out DD Form 98, Security Questionnaire, prior to ordering him to submit to induction? This question was raised by the records on file in this case.

SPECIFICATION OF ERRORS

I

The District Court erred in denying the motion for judgment of acquittal

II

There was insufficient evidence to support a finding of guilty in that the government's chief evidence was the Exhibit, the appellant's Selective Service file, which contains unrebutted evidence of two manifest denials of due process of law in the procedure of the Armed Forces Entrance and Examining (Induction) Station in this case.

SUMMARY OF ARGUMENT

I

There was no basis in fact for appellant's 1-A classification. He filed a form for conscientious objectors and thereby made out a prima facie case for a 1-O classification. There was no question raised about appellant's veracity. His agnosticism was not a proper reason for rejecting his claims. The Hearing Officer's bare statement that appellant was insincere was not grounded upon any facts revealed in the record and the decided cases hold that an unsupported opinion is not evidence.

II

The Hearing Officer's effective denial of appellant's right to have both his witnesses testify at the hearing was not supported by the regulations and was a denial of due process.

III

The failure to give appellant a physical examination on the induction date or within one year of the induction date was in violation of the applicable regulations and deprived appellant of the opportunity to avoid the induction order by being found physically unfit for service. This deprived appellant of due process.

IV

The failure to give appellant an opportunity to review and re-execute the Security Questionnaire, Form DD 98, on the date of induction or within one year prior thereto was likewise in violation of the applicable regulations and deprived appellant of due process.

ARGUMENT

I

There Was No Basis in Fact for the Rejection of Appellant's Claim to a Conscientious Objector's Classification.

Appellant claimed 1-O classification. 32 C.F.R. provides for such classification.

> "1622.14 Class 1-O: Conscientious Objector Available for Civilian Work Contributing to the Maintenance of the National Health, Safety or Interest.—(A) In Class 1-O shall be placed every registrant who would have been classified in Class 1-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces."

Authority for this regulation is derived from Section 6 (j) of Title 1 of the Universal Military Training and Service Act, as amended, which provides in part as follows:

> "Nothing contained in this title . . . shall be construed to require that any person be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. . . . Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned and such person shall be notified of the time and place of such hearing. . . . If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board."

In *Dickinson* v. *United States*, 346 U.S. 389, 396, 74 S. Ct. 152, 157 (1953), the court stated:

> "The task of the courts in cases such as this is to search the record for some affirmative evidence to support the local board's overt or implicit finding that a registrant has not painted a complete or accurate picture of his activities."

The District Court Judge in the instant case stated that it appeared to him that there was "ample basis in fact for the determination" [RT 133, lines 10 to 13] but he did not state the foundation for that observation nor refer to anything in the evidence that might constitute such a basis in fact.

Williams v. *United States,* 216 F.2d 350 (5th Cir., 1954), was a draft refusal case in which the conviction was reversed for the failure of the evidence to disclose any basis in fact for the undesired classification determination. After quoting the language recited above from *Dickinson,* the Court stated:

> "The District Court states that it found such evidence but failed to state what it was. After a diligent search, we have found none." (Page 351). "If there was no evidence before the board to refute the defendant's professed belief and if that belief was sincere on his part, then under the Act of Congress, he was exempt from training and service. As stated, we have found no such evidence in the records. A thorough reading of the record casts no doubt on the appellant's sincerity." (Page 352).

Thus in *Williams,* the Court went behind the ipse dixit of the District Court and made its own examination of the record to determine if any basis in fact was present and, finding none, reversed the conviction.

1. Appellant's Agnosticism Is Not a Basis in Fact to Reject His Claims.

In the instant case, a close reading of the record of the administrative procedures shows one pervading theme, appellant's agnosticism. It was cited by the United States

Attorney, on the first appeal [Ex. 51], as his sole reason for a negative recommendation. It was referred to by the appellant's local board during his interview [Ex. 58]. The Hearing Officer, at the second appeal, wrote in his recommendations:

> "The Resume of the Inquiry as a whole is less than persuasive with respect to registrant's religious objections to military service.
>
> "Registrant's SSS Form 150 is little more than a bare assertion of a conscientious objector claim. In response to Question 1 of Series 11, 'Do you believe in a Supreme Being?', The registrant answered, 'I do not know'...."

The leading opinions in this area of the law are the consolidated cases *Seeger, Jacobson* and *Peter* (all reported sub nom. *United States* v. *Seeger,* 380 U.S. 163, 85 S. Ct. 850). The convictions in *Jacobson* and in *Seeger* had been reversed by the Court of Appeals for the Second Circuit, in the former case because the defendant's beliefs in "Godness" (a "horizontal" as opposed to a "vertical" belief) as "The Ultimate Cause for the fact of the Being of the Universe" was sufficiently a "belief in relation to a Supreme Being" to qualify (325 F.2d 409) and in the latter case because the "Supreme Being" requirement created, in the opinion of the Second Circuit, "An impermissible classification" (326 F.2d 846). On the latter point, the Second Circuit had held:

> ". . . it now seems well established that legislative power to deny a particular privilege altogether does not imply an equivalent power to grant such a privilege on unconstitutional conditions."

In *Peter,* the Supreme Court reversed a conviction (sustained by the Ninth Circuit) where the defendant had failed to execute the Conscientious Objector portion of the Classification Questionnaire but attached a quotation expressing opposition to war in which he stated he concurred and, later, hedged the question of belief in a Supreme Being, on the Special Form for Conscientious Objectors, by stating that it "depended on the definition" and appended a statement that he felt it a violation of his moral code to take a human life and that he considered his belief superior to his obligation to the state.

In sustaining the decision of the Second Circuit, reversing the conviction of *Seeger,* the Supreme Court avoided a declaration of the unconstitutionality of the Supreme Being classification by holding that Seeger's beliefs, too, were to him sufficiently "beliefs in relation to a Supreme Being" to qualify.

Seeger had altered the oath on the Special Form for Conscientious Objectors, which reads, "I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form." to "I am, by reason of my 'religious' belief, conscientiously opposed to war in any form." To the Supreme Being question, he answered that "The existence of God cannot be proven or disproven, and the essence of his nature cannot be determined. I prefer to admit this and leave the question open, rather than answer 'yes' or 'no' ". Rejecting dependence on a Creator for a guide to morality, Seeger asserted "more respect for * * * belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed."

In the case presently before this Court, the appellant signed the oath without any alteration, basing his claim on "religious training and belief." He described his belief as one in "A Supreme order which is responsible for all being" and which "does not allow me to take human life." Such a statement is not even the outright agnosticism of Seeger but more akin to the "Godness" which Jacobson described as "The Ultimate Cause for the fact of Being of the Universe." In the light of these decisions, the appellant's belief should be held to be within the scope of the "Supreme Being" classification as a matter of law and no basis in fact for rejection of his conscientious objection claims.

2. The Hearing Officer's Bare Statement That Appellant Was Insincere Is Not a Sufficient Basis in Fact.

The Selective Service System raised no question (none is recorded) concerning the veracity of the appellant. The question therefore is not one of fact, but is one of law; *Dickinson* v. *United States*, 346 U.S. 389 (1953). The law, and the facts in his file, at least prima facie, establish that appellant is a conscientious objector opposed to both combatant and non-combatant military service.

If a Court of Appeals, as in *Williams* (see *supra*), will not accept the ipse dixit of a District Court Judge, should the unsupported statement of a mere hearing officer stand upon higher ground?

In *Annett* v. *United States*, 205 F.2d 689, 691, the Tenth Circuit commented:

> "To merely state that he does not consider him sincere without giving a single fact upon which such belief is predicated does not rise to the dignity of evidence."

The Hearing Officer's report [Exs. 72 to 85] states,

> "The Department of Justice concludes that the registrant is not sincere in his claim and recommends to your Board that his conscientious objector claim not be sustained." [Ex. 75].

The report does not say anything at all about appellant's demeanor or manner of answering at the hearing. It does, however, make several observations about appellant prior to stating this conclusion. These will now be examined, each in turn, to see if any possible basis in fact to support denial of the classification or any possible basis in fact to support the allegation of insincerity can be found therein.

The Report states:

> "Registrant was born October 13, 1940 in New York City. His parents are members of a Pentecostal Church, but the registrant claims membership in no religious organization. He graduated from high school in June, 1958, ranking 334 in a class of 557. He is currently attending Los Angeles City College, Los Angeles, California. In his SSS Form 100, filed in the Fall of 1961, registrant did not claim exemption as a conscientious objector. In his SSS Form 150, filed December 16, 1963, registrant claimed exemption from both combatant and non-combatant military training and service. The registrant's local board classified him 1-A and he appealed that classification." [Ex. 72].

The fact of non-membership in any religious organization is no factual basis for concluding that appellant is not a bona fide conscientious objector. None of the three young men involved in *Seeger* (see *supra*) were members

of any organized religious group. This fact is irrelevant negatively, although it may help a fact-finder affirmatively.

The fact of his parents' membership in a Pentecostal Church does not gainsay but rather supports the idea that appellant's beliefs are the product of "religious training" even if appellant has later parted company with some or all of the doctrines of the Pentecostal Church and with its organizational form.

The fact that appellant's Form 150 was first submitted two years after he filled out his classification questionnaire sheds no light on his sincerity or lack thereof. Seeger claimed his status as a conscientious objector for the first time four years after he was first classified. In Jacobson's case it was five years (380 U.S. 163, 167, 85 S. Ct. 850, 855) and in Peter's case, it was one year (324 F.2d 173, 174).

The other facts stated in the paragraph quoted above are patently irrelevant to the question in issue.

The next pertinent part of the Hearing Officer's Report [Ex. 73] states:

> "Registrant appeared before the Hearing Officer in Los Angeles, California on May 26, 1965, accompanied by his father. The registrant told the Hearing Officer that he had no criticism of the Resume of the Inquiry. The registrant stated that he believes in the teachings of Christianity but does not belong to any specific church. He told the Hearing Officer that he began to think about his values and attitudes at the age of 19, right after he had obtained his first draft notice. He then wanted to determine what he should do regarding his military status and, in order to as-

sist him in making up his mind, he made a trip to a number of foreign countries, spending approximately ten months in Israel. He explained that it was not until the fall of 1963, that he had fully made up his mind and that at that time he determined that he could not conscientiously be a part of any war effort or kill any human being. When the Hearing Officer closely questioned him concerning his attitude regarding physical defense in the event of an attack the Hearing Officer reported that it became apparent to him that the registrant had still not been able to fully determine his state of mind, and registrant indicated that his actions, at any such time, had to be guided by his emotions. The Hearing Officer pointed out that only when the registrant received his first draft notice did he begin to search his mind as to whether he would enter the military service. He advised that registrant has still not fully made up his mind as to whether he would physically defend himself and his family in the event of an invasion. The Hearing Officer concluded that the registrant is not sincere, either in his beliefs or intentions, and he found that the registrant does not conscientiously oppose participation in combatant and noncombatant service in the Armed Forces. He recommended that the appeal of the registrant based on conscientious objection be not sustained" [Exs. 73, 74]

Nonmembership in any specific church has been dealt with above. Foreign travel—even "ten months in Israel"—in no way casts a shadow of reasonable doubt on his sincerity.

The fact that appellant was nineteen when he first began to seriously consider the question of whether he would serve in the armed forces and the fact that this trend of

thought was precipitated by the arrival of his first draft notice logically tend to reinforce, rather than to weaken, appellant's position.[4] Can it be said, with any respect for reason, that a decision arrived at after five years of thoughtful consideration is of less worth than some precipitous conversion? The other possible interpretation is an inference by the Hearing Officer that the law requires conscientious beliefs to be formed in their entirety, during the immaturity of childhod and that such beliefs arrived at by the adult man are invalid. Both of these possible inferences demonstrate application of the wrong standard. There is no connection in logic or reason or experience between the issue in question and the Hearing Officer's conclusion that appellant lacked sincerity. Thus they cannot supply a basis in fact.

The Hearing Officer's statement that he closely questioned appellant about his attitude to physical defense in the event of an attack and that he concluded that appellant had not fully made up his mind on the subject indicates that the Hearing Officer was applying a standard of absolute pacifism as the touchstone of bona fide conscientious objection and doubting appellant's sincerity because appellant did not come up to this improper standard.

Again, the *Annett* case (see *supra*) bears a striking analogy to this one in that the Hearing Officer there stated a disbelief in defendant's sincerity based upon Annett's statement that he would kill in defense of his own life.

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4. This event was on October 14, 1958 [Ex. 3], when appellant was 19 years of age. His first claim for conscientious objector status was made November 29, 1963 [Ex. 43], five years later.

That Hearing Officer likewise hedged by saying that this answer caused him to doubt the sincerity of defendant's conscientious objection rather than flatly stating that he did not believe a person of such beliefs should be allowed to be a conscientious objector. The Court noted in *Annett* that the Hearing Officer had "Applied an erroneous standard" (205 F.2d 689, 691) and said:

> "The mere fact that he was willing to fight in defense of his own life does not mean that he did not have good faith religious scruples based on the teachings of his church against the command of his country to go to war and kill therein."

In the instant case, we do not have the benefit of a verbatim transcript of this inquiry but only the Hearing Officer's paraphrased conclusions. The appellant said, as paraphrased by his inquisitor, that his actions in the event of an attack would be guided by his emotions. This honest admission that, despite his conscientious objections to war in any form, a situation of peril to his immediate family might overcome his commitment, is another statement whose logical implications are a ringing endorsement of appellant's sincerity. How easy it would be for an insincere person to espouse, for the sake of the moment, a position of absolute conviction in his ability to remain nonresistant under even the most extreme situations. The fact appellant did not do so is a testimonial to his sincerity.

The fact that the Hearing Officer grasped at this straw with such tenacity, coupled with the fact that he kept repeating that appellant was not a member of a church and that appellant had stated "I do not know" to the Supreme Being question, shows that these latter considerations were

uppermost in the Hearing Officer's mind. This is reinforced by the Hearing Officer's statement at the hearing, as testified to by appellant, without rebuttal. He said that appellant "was not like the other cases that came by, and that (he) did not believe in a religion as a Jehovah's Witness does" [RT 53, lines 20 to 22].

This hearing was held in August, 1965. The *Seeger* case was decided in May, 1965. The Hearing Officer must be presumed to know the law he is supposed to be applying, so he knew that agnosticism is not antithetical to conscientious objection. Yet he did not refrain from citing evidence of agnosticism as evidence against appellant, and then garnishing it with an unsupported allegation of insincerity.

This becomes even more clear in his summing up. He says the resume "As a whole is less than persuasive" yet the resume attached [Exs. 77 to 85] contains not a single derogatory statement about appellant and many affirmative endorsements of the sincerity of his belief. The Hearing Officer says "He never gave public expression to his views (Question 7)", yet this statement is repeatedly contradicted by the statements of informants in the very resume he groundlessly dismisses.

His zeal to find some iota of evidence for his assertion of insincerity becomes overt in his manifest overstatement when he says "conscientious objection seems not to have been thought of until induction became imminent." The "imminence" of induction was the fact that appellant first thought seriously on the subject at age 19 when he first received a draft notice. In 1959, the induction age was

23 or 23-1/2. Only after the Vietnam escalation did it descend. He then recites that appellant "never gave public expression to his views" when the resume that the Hearing Officer attached to his report itself shows seven different informants who stated that appellant had expressed his views against killing to them [Exs. 77 to 85], including a professor at Los Angeles City College who told of appellant's speech on the topic "Thou Shalt Not Kill".

Thus the report of the Hearing Officer contains no basis in fact but simply the Officer's ipse dixit.

Even if some basis in fact could be found for the Hearing Officer's conclusion that appellant was insincere, the Appeal Board that acted upon the Hearing Officer's recommendation did not indicate whether it based its decision on the alleged insincerity or upon his agnosticism. The same situation appeared in *Jacobson* (see 380 U.S. 163, 168, 85 S. Ct. 850, 855) where the Supreme Court affirmed the Second Circuit's order directing dismissal of the indictment on that ground.

II

Appellant Was Denied Procedural Due Process by the Manner in Which the Hearing Officer's Hearing Was Conducted.

Appellant brought two witnesses with him to the Hearing Officer's hearing [RT 49], his father and one Richard Brooks, a personal friend. The witnesses who testified had slightly divergent recollections of what transpired there.

Appellant testified that Mr. Gillins, the Hearing Officer, told him he was allowed to have only one person

come into the hearing room with him [RT 50, lines 20 and 21], that his father accompanied him leaving Brooks outside, that his father spoke on his behalf [RT 53, lines 2 to 4], that Mr. Gillins indicated the moment when the interview was terminated [RT 53, lines 13 to 17] and that he never asked appellant whether he had any other witnesses there to testify on his behalf [RT 53, line 24, to RT 54, line 7]]. Richard Brooks testified that the Hearing Officer told appellant that "You will only be allowed one witness." And that he was not given an opportunity to testify [RT 71 and RT 72, lines 14 to 24]. Appellant's father, Frank Machado, testified that the Hearing Officer said "Only one can come in." [RT 76, line 13] but later testified that he could not recall the exact words [RT 77, line 5].

The Hearing Officer himself testified that he told them that appellant could have only one witness in the hearing room with him "at one time". When asked why he did that, the Hearing Officer testified that the Department of Justice had so instructed him [RT 83, lines 1 to 11].

The Hearing Officer further testified that he did not ask appellant if he had anyone else to speak on his behalf although he was aware of the fact that appellant had brought another person with him [RT 87, lines 4 to 16].

The pertinent regulations covering Hearing Officer Hearings are in Appendix A, and show that the Hearing Officer didn't have them in mind, namely, he was not so instructed but was given discretion on the subject. Therefore, we assert he mistakenly, or otherwise, abused his discretion to the detriment of the appellant.

Thus in failing to follow the regulations and in leading appellant to believe that his witness, Richard Brooks, would not be allowed to participate, the Hearing Officer deprived appellant of a full and fair opportunity to establish his sincerity.

III

The Evidence Was Insufficient to Convict Appellant in That It Appears Without Contradiction That Appellant Was Not Given a Physical Examination Within One Year of the Induction Date, a Denial of Due Process.

The government's case in chief consisted solely of the appellant's Selective Service file introduced as an Exhibit.

In that file, the following items appear relative to physical examination of appellant:

1. A "Report of Medical History" (Standard Form 88) dated 3 May 62 [Ex. 129].
2. Another "Report of Medical History", dated 11 May 64 [Ex. 127].
3. A "Report of Medical Examination" dated 3 May 63 [Ex. 125].
4. Another "Report of Medical Examination" dated 11 May 64 [Ex. 123].
5. A partially filled out "Report of Medical Examination", undated, and containing no information except appellant's name, address, SSS number, and the name and address of the examining station. Note that the Physical Inspection stamp used customarily on the date of induction appears but is not filled out [Exs. 121 and 122].

6. Three "Record of Induction" forms appear in the file. One shows a medical determination made on 3 May 63 [Ex. 120] and another shows a medical determination made on 11 May 64 [Ex. 118]. The third form has blanks in the medical determination boxes and the words "refused induction" handwritten across the page [Ex. 116].

The induction station customarily grants each inductee a physical inspection on the date of induction before ordering them to submit to induction. In addition, the regulations provide for a physical examination to be made in every case where the pre-induction physical is over one year old.

32 Code of Federal Regulations, Section 1628.10 provides:

> "1628.10 WHO WILL BE EXAMINED: Every registrant, before he is ordered to report for induction . . . shall be given an armed forces physical examination under the provisions of this part, except that a registrant who is a delinquent and a registrant who has volunteered for induction may be ordered to report for induction without being given an armed forces physical examination."

The appellant's Selective Service file does not show that he was a delinquent or that he volunteered for induction.

This regulation was supplemented by Local Board Memorandum No. 28 of the National Headquarters of the Selective Service System which provided in Paragraph 2 that:

> ". . . (W)hen a registrant whose physical examination is more than 120 days old is selected for induction, the local board shall not order him to report for armed forces physical examination but shall order him to report for induction. In each such case, the registrant will receive a complete examination at the armed forces induction station and when found acceptable will be immediately inducted."

Note that the examination is to precede induction.

This Local Board Memorandum was rescinded on August 31, 1961, because "Army Regulations No. 601-270, Personnel Procurement-Armed Forces Examining Stations and Armed Forces Induction Stations, and current changes thereto in loose-leaf form are now distributed throughout the Selective Service System. Signed Lewis B. Hershey, Director".

The said Army Regulation provides the same except that the maximum period has been extended to one year.

Appellant was ordered to submit for induction on December 21, 1965 [CT 2], more than one year after his last armed forces physical examination on May 11, 1964. He was given no physical examination on December 21, 1965.

Thus the Induction Station failed to follow their own regulations and denied to appellant the opportunity to take a physical examination that could have resulted in his disqualification for military service.

This Court may take judicial notice of the fact that 53 per cent of inductees are rejected as shown by Selective Service News, monthly tabloid-size publication of Selective Service System National Headquarters.

The Induction Station forced appellant into the position where he had to choose between violating his conscience by submitting to military service or to face the chance of a substantial term of imprisonment, without giving him the opportunity that the regulations provide to avoid this dilemma. This was patently unfair to appellant and a denial of due process.

IV

The Evidence Was Insufficient to Convict Appellant in That It Shows That He Was Not Given an Opportunity to Review Form DD 98 As Required by Army Regulations.

Army Regulations 601-270, cited above, also provide that inductees shall be required to re-execute the Armed Forces Security Questionnaire, Form DD98, prior to induction, if it is over one year old.

Appellant's file shows that the DD98 was signed by appellant on 3 May '63 [Ex. 141]. On that same page is a stamp that reads as follows:

> "I have this date, ... , reviewed the contents of DD Form 98 prepared by myself on ..... and certify that the statements then made by me are at this time full, true, and correct.
>
> ....
> Signature of Witnessing Officer Signature"

In appellant's file, this stamp appears in this form without the blanks filled in. The Regulations provide that if the execution of the DD 98 by the person selected for induction is over 120 days old, an officer shall go over the form with him, have him re-execute the declaration, and sign as a witness.

In a District Court case in this District, the Honorable William C. Mathes had before him a defendant in the same posture as this appellant (*United States* v. *Israel Feuer*, 25778-WM, S. D. Calif.). In acquitting that defendant, the Judge said:

> "This is almost like—ethically at least—A registrant with his record who has vision that just doesn't quite meet the Army requirements, and the doctor says, 'Well, we will pass him anyway because he will refuse to be inducted and they will send him to prison for committing a felony.' There is too much that is incongruous about that. It is too much like the Communists themselves would do, if you please, in the language of the street, to set a man up to convict him of a felony." (Reporter's Transcript in #25778-WM, page 3, lines 19 through 25).

In response to the government's argument that the irregularity had not damaged that defendant, Judge Mathes said:

> "Well, it is akin to unlawful entrapment. Morally it is akin to unlawful entrapment as I view it. You are going to force a man into a position where you know he is going to commit a felony; whereas if you let him go the other way, he wouldn't." (Reporter's Transcript in #25778-WM, page 4, lines 10 to 16).

A defendant in a draft refusal case must show that he has exhausted all of his administrative remedies or he may not mount an attack on his classification as a defense in court, *United States* v. *Falbo*, 1944, 320 U.S. 549, 64 S. Ct. 346. He is required to exhaust his administrative remedies so that the courts will not be burdened with trials that

might have been avoided by the defendant's success at some stage of the administrative process which would preclude his being ordered to submit to induction. The courts have been rather rigid on this exhaustion point, requiring that the defendant go to the brink of induction, that he complete every step of the process prior to refusing to actually enter the military, *Estep* v. *United States,* 1946, 327 U.S. 114, 66 S. Ct. 423.

All of the arguments that support the requirement that the defendant exhaust the administrative process apply with equal vigor to the government. Shortcuts to induction taken by the government burden the courts with cases that could have been avoided altogether, to say nothing about the inconvenience and expense to the young men involved.

For this reason, as well as for the reason that deprival of a chance to avoid the dilemma is grossly unfair to the appellant, the government should be required to exhaust the administrative opportunities for rejection that the regulations provide before forcing the registrant to induction, refusal and trial.

CONCLUSION

For the reasons cited above, the judgment of the District Court should be reversed and an order entered directing the District Court to enter a judgment of acquittal.

Respectfully submitted,

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I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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